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MATERIALIZING DEMOCRACY

*Toward a Revitalized Cultural Politics*

*Russ Castronovo and Dana D. Nelson, editors*



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25 Ibid., 167.

26 Neil Hertz, *The End of the Line: Essays on Psychoanalysis and the Sublime* (New York: Columbia University Press, 1985).

27 Ibid., 174.

28 Jacques Rancière, "Discovering New Worlds: Politics of Travel and Metaphors of Space," in *Traveller's Tales: Narratives of Home and Displacement*, ed. George Robertson et al. (London: Routledge, 1994), 35.

29 Ibid., 33.

30 Norman Birnbaum has remarked that "de Tocqueville wrote about a preindustrial society: the recurrence of his thought may suggest something else than a commendable desire to go to the historical roots of our political culture. The nation has changed immensely since de Tocqueville's visit. The French thinker, a recalcitrant liberal (in the European sense) with deep doubts about democracy, [may have served to legitimate ambivalence about democracy.] He, or his ideas have also served to avert our gaze from problems presented by industrialization, by immigration, by the end of slavery and by empire" (*Radical Renewal: The Politics of Ideas in Modern America* [New York: Pantheon Books, 1988], 66).

31 See Lisa Lowe, *Critical Terrains: French and British Orientalisms* (Ithaca: Cornell University Press, 1991), 31.

32 See Michel de Certeau, *The Practice of Everyday Life* (Berkeley: University of California Press, 1988), 123.

33 For an illuminating discussion of this dynamic, see Chantal Mouffe, "For a Politics of Nomadic Identity," in *Traveller's Tales: Narratives of Home and Displacement*, ed. George Robertson et al., 105–13.

JOAN DAYAN

## *Legal Slaves and Civil Bodies*



I begin with a story, evidence of what some call the "supernatural," as entry into my discussion of the sorcery of law: most instrumental when most fantastic and most violent when most spectral.

During my last visit to Haiti, I heard a story about a white dog. Reclaimed by a *oungan*, or priest, who "deals with both hands" practicing "bad" magic, the dog comes back to life in skin bloated with spirit. Starving, its eyes gone wild, it appears late at night with its tongue hanging out. A friend called it "the dog without skin," but this creature was not a dog. Instead when a person died, the spirit, once stolen by the *oungan*, awakened from what had seemed sure death into this new existence in canine disguise. We all agreed that no manhandled spirit would want to end up reborn in the skin of the dog. Being turned into a dog was bad enough, but to end up losing color, to turn white, seemed worse. In this metamorphosis, the skin of the dead person is left behind, like the skin discarded by a snake. But the person's spirit remains immured in the coarse envelope, locked in another form, trapped in something not her own.<sup>1</sup>

What was once condemned as unreal or magical, shunted aside or projected onto those peoples and places deemed "uncivilized," remains, though hidden, at the heart of the modern state. My inquiry concerns the metaphysical hub that gives law the power both to preserve and to manipulate the categories of spirit and body. This transformation of categories—the double movement and complex relations between the extremes of flesh and mind, external and internal, and what can be removed and what must remain—gives the juridical order the power to redefine persons.

By taking the story of the white dog as model and code for understanding the

rituals of law, I intend to take spiritual belief as legal commentary and vice versa. In analyzing how the rhetoric of law both disables civil persons and invents legal slaves, I argue that the creation of an artificial entity, whether the civil body, the legal slave, or the felon rendered dead in law, takes place in a world where the supernatural serves as the unacknowledged mechanism of justice. From its beginnings, law traded on the lure of the spirit, banking on religion and the debate on matter and spirit, corporeal and incorporeal, in order to transfer the power of the deity and the dominion of the master to the corrective of the state. The rituals I examine not only became critical to the ideology of democracy and liberty but also shaped a genealogy of property and possession essential to America's social memory. Legal structures give flesh to past narratives and new life to the residue of old codes and penal sanctions.

The law materializes dispossession, and in far more corporeal ways than its abstract precepts might first suggest. How, then, do the terms of law legitimate containment and exclusion? What are the conditions under which categories of identity are legally reconstructed? Which words act as revenants, haunting the precincts of law? In the United States, the pure principle of democracy exacted the most extreme practices of oppression. This essay seeks to analyze, on one hand, how this domination proffered to a society of equals depended on rituals of expulsion and exclusion; and, on the other, how these practices took their consummate form in the penitentiary. Punishment and prisons not only became critical to the ideology of democracy and freedom but also shaped a genealogy of property and possession essential to the "American project."<sup>2</sup> Beaumont and Tocqueville's *On the Penitentiary System in the United States, and Its Application in France* (never reprinted since its publication in 1833) must thus be read as a dark gloss to Tocqueville's *Democracy in America*. Like the furies buried beneath Athens so that the ideal city can be born, the idea of freedom became coterminous with the necessities of containment. As Beaumont and Tocqueville confessed: "Whilst society in the United States gives the example of the most extended liberty, the prisons of the same country offer the spectacle of the most complete despotism."<sup>3</sup>

#### SACRIFICE

In his *Commentaries on the Laws of England*, William Blackstone, explaining how civil liberty arises on the ruins of the natural, set the ground for the creation of an artificial person in law: "But every man, when he enters society, gives up a part of

his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it."<sup>4</sup> Unlike the Pauline admonition to relinquish the trappings of the physical to be raised a spiritual body, Blackstone's version of new life depends not on belief in Christ but in the civil order. The rebirth of the individual in society does not depend on dying through and to the law. Instead, the civil, once codified in the institution of law, demands the dual gestures of submission and repression of the natural. In these fictions of juridical obeisance, the old nature first takes on the skin of the civil, then pacts to contain itself within that skin. In this way, by the very terms of Blackstone's contract, the state of society never completely transcends that of nature. The natural person, who existed before the social contract, though reduced to a repressed spirit in civil skin, nonetheless haunts the margins of the formal community. Blackstone thus reminds his reader that in heralding the rituals of renunciation and repression as essential to the promotion of a coherent legal order, he means much more than a one-off exchange for the greater good. For the tradeoff is merely one instantiation of what must be a quasi-religious process, a ritual of citizenship to be staged again and again in order to keep the facade of the civil intact, the natural residuum in check, and thereby reassure the stability of civilization.

The image of the dog skin that encases the spirit of the dead person can be related figuratively both to the *civil body*, the artificial person who possesses self and property, and to the *legal slave*, the artificial person who exists as both human and property. In juxtaposing these two conditions of being, I suggest that the potent image of a servile body can be perpetually reinvented. In this ritual, both legal slave and civil body are sacrificed to the civil order. Although both entities are legally distinguished from natural persons, civil bodies are governed by one set of laws and legal slaves by another. Different as they are in position, in rights and duties, they cannot be the subjects of a common system of laws. The distinctions between them, however, remain shaky. The two conditions interrelate in crucial ways. I will suggest that certain images recur; and words like *blood*, *corruption*, and *death* have a remarkable staying power.

In reconstructing this narrative of human unfreedom, I need briefly to confront the problem of juxtaposing civil bodies and legal slaves. I begin with the equivalence of free person and slave because I want to analyze what happens to

persons and progeny in two cases: the free person of property who commits a felony and undergoes civil death; and the enslaved person, whom I suggest is the carrier of "negative personhood," who has undergone social death. Although the person declared civilly dead had property to lose, in most instances the slave never had property and was in fact property and could never have any relation to property. The institution of slavery depended on embodying the black as merely material, what could be described as a philosophy of denaturalization that turned humans into things or mongrels. The fiction of the "citizen," however, summons a somewhat less certain transit between restraint and freedom, capacity and disability. In bringing what might first seem to be an unlikely conjunction to the fore, the lethal machinery of juridical value becomes clear. Slaves and criminals form the two extremes of this analysis, but these exceptions put the citizen who is nonslave or nonfelon in a constant and fearful zone of ambiguity.

Rather than focusing on social attitudes and relationships, in this essay I instead trace a developing logic in modern law. I explore how, by the eighteenth century, the appeal to Judeo-Christian antecedents and inchoate traditions of punishment would be redescribed and fully articulated as a rationale appropriate to the needs of emerging modernity. In this logic, the law covers the person with white skin and the law encases her in black, whether or not the colors can be seen. The law giveth and the law taketh away. The law kills and the law resurrects. Legal practice thus conflates symbolic control and the inscription of that control on real bodies. If the natural dies not to be reborn in the spirit but in the body of civil society, what kind of body is this?<sup>5</sup>

In *Slavery and Social Death*, Orlando Patterson makes two crucial points that suggest the troubling power of legal authority. In his section "Property and Slavery," he first draws our attention to the habitual definition of a slave as someone without a legal personality: "It is a fiction found only in western societies, and even there it has been taken seriously more by legal philosophers than by practicing lawyers. As a legal fact, there has never existed a slaveholding society, ancient or modern, that did not recognize the slave as a person in law."<sup>6</sup> Patterson proposes a theory of negative capability, while he remains silent about the disabling inherent in the very process of creating a legal personality that has been granted statutory life only to be enslaved. Then, discussing what he calls "liminal incorporation," while trying to come to terms with the socially dead slave who yet remains a part of society, he writes: "Religion explains how it is possible to relate to the dead who still live. It says little about how ordinary people should relate to the living who are dead" (45).

These two passages refer first to the actually dead though alive in spirit as

opposed to the actually alive though dead in law; and, second, the supernatural relation of the believer to the dead who do not die, as opposed to the natural and daily relation of the living who are dead, who have undergone what Patterson, following Claude Messailloux, calls "social death" (38). Patterson's insistence that slaves in every legal code are treated as persons in law, urges upon us these questions: In what way and when were slaves allowed to be persons? When resurrected as legal personalities, what can they do, what are their possibilities? And if, finally, Patterson distinguishes between the ontology of civil life and the realm of myth or religion, what happens if we insist on bringing myth and legal practice together; or to be more precise, to juxtapose the "social death" of slaves with the "civil death" of felons in order to ask whether statute and case law could be more important than social custom in effecting rituals of exclusion, and, as I will emphasize, in maintaining the racial line. If we make slavery in the Americas our hypothetical still point, then we can consider what kinds of persons would end up being redefined as dead in law. It was as easy to deem the extinction of civil rights and legal capacities as punishment for, or the necessary consequence of, the crime of color as it was for the conviction of crime. For color, this appearance of moral essence or transmissible evil could stand in society as both a threat and a curse, or finally, as justification for the subjugation of those so tainted.

Using the legal fiction of "civil death" as anchor, I return to what has been deemed a remnant of obsolete jurisprudence: the state of a person who, though possessing *natural life* has lost all *civil rights*. Unnatural or artificial death as punishment for crime entailed a logic of alienation that could extend perpetually along constructed lines of racial kinship.<sup>7</sup> Its legal paradoxes, its gothic turns between tangible and intangible, life and death, became necessary to the racialized idiom of slavery in the American social order. The alternating moves between the idea of civil death and the meaning of servitude operated both forward and backward along a temporal continuum to exclude, subordinate, and annihilate. For what had been forfeiture of property and corruption of blood—those few circumstances in which civil death was coextensive with physical death and that were understood by Blackstone as caused by profession (as in a monk professed), abjuration from the realm (deportation for crime), and attainder and banishment (for treason)—became the terms for a specifically colonial rendition of legal incapacitation (1:128–29).

How did civil death affect rights of property and privilege at common law? There were three principle incidents consequent on an attainder for treason or felony: forfeiture, corruption of blood, and the *extincti* on of civil rights, more or

less complete. Of Saxon origin, forfeiture was part of the punishment of crime by which the goods and chattels, lands and tenements, of the attainted felon were forfeited. According to the doctrine of corruption of blood, introduced after the Norman Conquest, the blood of the attainted person was held to be corrupt, so that he could not transmit his estate to his heirs, nor could they inherit. According to Blackstone, this inequitable and "peculiar hardship" meant that the "chanel" of "hereditary blood" would not only be "exhausted for the present, but totally dammed up and rendered impervious for the future" (2:256, 253).

I distinguish civil death from other legal sanctions because this concept and its attendant disabilities maintained both a strictly hierarchical order and the blood defilement on which that order depends. Corruption of blood operated practically as a severing of blood lines, thus cutting off inheritance, and metaphorically as an extension of the "sin" or "taint" of the father visited on his children. If we treat *blood* and *property* as metaphors crucial to defining *persons* in civil society, then it is easy to see how "corruption of blood" and "forfeiture of property" could become the operative components of divestment. By a negative kind of birthright, bad blood blocked inheritance, just as loss of property meant disenfranchisement. Yoked together as they are, these terms loosely but powerfully define types of slavery. Whether applied to the slave or the criminal, both are degraded below the rank of human beings, not only politically but also physically and morally.

In my pursuit of a conceptual framework for disabilities made indelible through time, I follow the call of *blood*, its meaning and effects, both literal and metaphoric, through three sites of disabling: from the feudal *attainder*, the essence of which became corruption of blood, as punishment for crime; to the transport of blood to the British colonies and its incarnation as the black taint that legally inscribed slavery; to the disabilities of the post-Civil War, when slaves were reborn as criminals and translated into "slaves of the state." I take this circuit of stigmatization as a *historical residue* that turns metaphoricity into a way of knowing; that is, acknowledging history. How this project of incapacitation has continued to threaten the weak and socially oppressed, how old rhetorical strategies initiate new forms of containment, is what matters here.

#### BLOOD

In rereading the claims of civil death into the genealogy of slavery and incarceration, I propose a continuum between being declared dead in law, being made a

slave, and being judged a criminal. Blackstone referred to natural liberty as "residuum" (1:129), and he figured this residue of nature as a stain. The imprint of corruption becomes the legitimating metaphor for what I have described as the sacrificial formation of the civil person. In other words, for the figurative distinction of civil and natural to function in the realm of action, the metaphor of corruption must be grounded in would-be observable fact. Blackstone's language thus connected the figurative nature and the material body: "For when it is now clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to society, the law sets a note of infamy upon him, puts him out of its protection, and takes no further care of him barely to see him executed. He is then called attain, *attinctus*, stained or blackened" (4:380). The image of the "blackened" person, disabled but not necessarily dead, remained a more terrifying example of punishment than the executed body. Moreover, the deficiency of hereditary blood and its consequences for the felon's descendants became an alternative death penalty: not actually but civilly dead. Strict civil death, the blood "tainted" by crime, set the stage for blood "tainted" by natural inferiority. This discrimination would produce the nonexistence of the person not only in the West Indies but in the United States. The racialized fiction of blood, moreover, supplemented the metaphoric taint, not only defining property in slaves but fixing them and their progeny and descendants in status and location.

What is "corruption of blood"? According to legal doctrine, the blood of the attainted person was, as I have noted, judged to be corrupt, so that he could neither inherit nor transmit his estate to his heirs. As Thomas Blount explained in his 1670 *Nomo-lexicon, a law dictionary*, "Corruption of Blood [is] an infection growing to the State of a Man (attainted of Felony or Treason) and to his issue: For, as he loseth all to the Prince, or other Lord of the Fee, as his case is; so his issue cannot be heirs to him, or to any other Ancestor by him. And if he were Noble, or a Gentleman before, he and his children are thereby ignobled and ungentiled."<sup>8</sup> How was this degradation enacted? In exploring this terrain, I appeal to a history that emphasizes the paradox and reciprocity of disabling registered in both legal fictions and religious fantasies. For depersonalization took place in the marketplace as well as on the sacrificial altar, through commercial transactions as well as religious rites. Recall the general concept of corruption of blood in the curse of Psalm 109: "Let his posterity be cut off; and in the generation following let their name be blotted out. / Let the iniquity of his fathers be remembered with the Lord; and let not the sin of his mother be blotted out. /